[ORAL ARGUMENT SCHEDULED FOR MAY 8, 2006]

No. 05-5477

In the United States Court of Appeals *for the* District of Columbia Circuit

ABU BAKKER QASSIM and ADEL ABDU' AL-HAKIM,

Petitioners-Appellants,

v.

GEORGE W. BUSH, ET AL.,

Respondents-Appellees.

ON APPEAL FROM A FINAL JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF PETITIONERS-APPELLANTS

Barbara Olshansky
Deputy Director
CENTER FOR
CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6439

Sabin Willett (Bar No. 50134)
Counsel of Record
Rheba Rutkowski
Neil McGaraghan
Jason S. Pinney
BINGHAM McCUTCHEN LLP
150 Federal Street
Boston, MA 02110
(617) 951-8000

Susan Baker Manning (Bar No. 50125)
BINGHAM McCUTCHEN LLP
1120 20th Street NW, Suite 800
Washington, D.C. 20036
(202) 778-6150

Counsel for Petitioners-Appellants

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), undersigned counsel certifies as follows:

(A) Parties and *Amici*

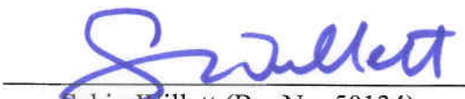
The parties, intervenors, and *amici* appearing before the district court and this Court in this action are Abu Bakker Qassim (Petitioner), Adel Abdu' Al-Hakim (Petitioner), George W. Bush (Respondent), Donald Rumsfeld (Respondent), Jay Hood (Respondent) and Brice Gyurisko (Respondent). The Amici are the Uyghur American Association, the American Civil Liberties Union, and former federal judges Hon. John J. Gibbons, Hon. Shirley M. Hufstedler, Hon. Timothy K. Lewis, Hon. William A. Norris, Hon. H. Lee Sarokin, and Hon. William S. Sessions.

(B) Rulings Under Review

The ruling at issue in this Court is the district court's denial of a remedy to the Petitioners as part of its final order in *Qassim v. Bush*, No. 05-0497 (D.D.C. Dec. 22, 2005) (Robertson, J.). A copy of the district court's decision can be found in the Addendum to the Brief of Petitioners - Appellants ("Opening Brief") at pages 01 - 12 and in the Joint Appendix at pages 0346 - 0358.

(C) Related Cases

This case has previously been before this Court in connection with the Respondents' motion to stay. *See Qassim v. Bush* (No. 05-5213), *Qassim v. Bush* (No. 05-5240), and *Qassim v. Bush* (No. 05-5249). Those appeals have been dismissed as moot. There are no related cases.



Sabin Willett (Bar No. 50134)

TABLE OF CONTENTS

TABLE OF AUTHORITIES[1]

CASES

FEDERAL STATUTES, ACTS, RULES, AND REGULATIONS

---

[1] Authorities upon which we chiefly rely are marked with asterisks.

ORDERS AND INTERNATIONAL AGREEMENTS

MISCELLANEOUS

PRELIMINARY STATEMENT[2]

Last year, when this case first came to light and District Judge Robertson retained jurisdiction, a small mercy came into the lives of the innocent men now imprisoned at Guantánamo: they were permitted to meet their lawyers without being chained. No more. Counsel just returning from a base visit this month reports that the military has now ordered that all counsel visits for non-enemy combatants take place at Camp Echo, where protocol has been that the men are chained to the floor in solitary-confinement huts. *See* Petitioners' Supplemental Appendix at 0458 (Decl. of J. Wells Dixon). Four days from now, Petitioners will reach the first anniversary of the Executive's formal concession that they are not enemy combatants. They will observe this milestone behind razor wire, with no end in sight to their long night at Guantánamo.

SUMMARY OF ARGUMENT

Although the military found the Petitioners to have no Taliban affiliation and to have engaged in no hostile act, the Executive's brief uses words of resonance to create the impression that the Petitioners are dangerous and to suggest that its role is ameliorative. Both the impression and the suggestion are false.

The Executive's arguments that the Detainee Treatment Act applies to this case are erroneous. As demonstrated in the Petitioners' opening brief ("Opening Brief"), as well as in briefs submitted to this Court in other Guantánamo appeals, the Act is not retroactive and is, in any case, inapplicable to the Petitioners.

The Executive's arguments that Judge Robertson erred in concluding that the Petitioners' detention is unlawful also are incorrect. Its arguments are unsupported by

---

[2] Unless otherwise indicated, abbreviated terms have the meanings ascribed to them in the Petitioners' opening brief.

case or historical precedent, claim a right of limitless imprisonment, and are contradicted by the Supreme Court's decision *Zadvydas v. Davis* and other authorities.

The lower court was obliged to fashion a remedy. The Executive does not even try to address the many authorities establishing this point, is mistaken in its reading of immigration law, and erroneously suggests that a "conflict" between *habeas* corpus and immigration law blocks a remedy.

The President is a proper *habeas* respondent. The Executive waived this argument by failing to raise it below and the argument is, at all events, incorrect, particularly in light of the Supreme Court's recent decision in *Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235 (2006).

ARGUMENT

A. The Executive's "Factual" Contentions

1. The Guantánamo Myth

The Guantánamo Myth -- that as a general proposition Guantánamo houses "terrorists" and "enemy combatants"[3] -- flourishes because the Executive has so deftly

---

[3] The CSRT findings show that only five percent of Guantánamo detainees were taken on a battlefield. Mark Denbeaux *et al.*, REPORT ON GUANTÁNAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA at 2 (2006) ("DOD DATA"), http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf (last visited Mar. 21, 2006). Most detainees -- like these Petitioners -- were sold for bounties by local tribesmen who received leaflets promising enormous (by local standards) amounts of cash. *Id.* at 3; App. 211. The Secretary of Defense calls Guantánamo prisoners the "worst of the worst," *see* Linda D. Kozaryn, *U.S. Gains Custody of More Detainees*, AM. FORCES INFO. SERV., Jan. 28, 2002, *available at* http://www.defenselink.mil/news/Jan2002/n01282002_200201284.html, yet CSRT records disclose not a single hostile act in the case of more than half of the detainees. DOD DATA at 2. Murat Kurnaz, whose appeal is pending before this very Court, was held, the Executive said, because a friend had carried out a suicide bombing after Kurnaz's imprisonment. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 470 (D.D.C. 2005). The friend is alive and well and living in Germany. *See* Carol D.

managed its public relations campaign. It was never more artful than in Appellees' Brief ("Gov't Brief"), in which it reprises the tried-and-true words and phrases "*weapons training*," "*Afghanistan*," "*military facility*," "*the Taliban*," and "*Tora Bora*." The resonance is powerful, frightening -- and false.

In view of the record, the Court might wonder why the Executive incants these incendiary terms. The military itself concluded that the Petitioners were not "part of or supporting Taliban or Al Qaeda forces or associated forces." *See* Opening Brief at 5-6. As for "weapons training," the military concluded that neither Petitioner is a "person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." *Id.* That means there was *never* any Al Qaeda affiliation, *never* a Taliban affiliation, and *never* support for hostilities. So why, five years later, are we hearing about the "Taliban" and "weapons training"?

Leonnig, *Panel Ignored Evidence on Detainee; U.S. Military Intelligence, German Authorities Found No Ties to Terrorists*, WASH. POST, Mar. 27, 2005, at A-1 (reporting that the "suicide bomber" is alive and under no suspicion by German authorities, and that Kurnaz's CSRT panel ignored multiple conclusions in his classified file that Kurnaz has no connection to the Taliban, Al Qaeda or any other terrorist threat). Kurnaz remains in Guantánamo today. His case is stayed and awaiting this Court's ruling on an appeal filed more than a year ago. *Al Odah v. Bush*, No. 05-04241. His experience is commonplace. A former Saudi police officer was detained by the Taliban as an enemy of the regime. Now he is at Guantánamo. *See* DEPARTMENT OF DEFENSE, REPROCESSED COMBATANT STATUS REVIEW TRIBUNAL (CSRT) AND ADMINISTRATIVE REVIEW BOARD (ARB) DOCUMENTS, Set 33, at 02419 (2006), *available at* http://www.defenselink.mil/pubs/foi/detainees/csrt/index.html ("CSRT Documents") (Summarized Sworn Detainee Statement for ISN No. 308). Another detainee raised chickens. *Id.*, Set 3, at 00276 (Summarized Sworn Detainee Statement for ISN No. 581). As the Executive's belated releases of the CSRT Documents show -- releases it resisted for more than a year of litigation -- scores of these absurd cases have remained unknown because of the stubborn refusal of the Executive and the district courts to follow the mandate of *Rasul v. Bush*, 542 U.S. 466, 485 (2004), and "consider in the first instance the merits of petitioners' claims."

The answer is that in the Guantánamo litigation the Executive has rarely been disappointed when it put its faith in the power of resonance. The phrase "weapons training" is a case in point. It paraphrases a belated affidavit submitted by the Guantánamo Joint Task Force commander and Respondent, Army Brigadier General Jay Hood, after the Petitioners' non-enemy combatant status came to light. App. 233-37.[4] What General Hood said was that Petitioners had received "small arms" training. App. 234. "Weapons" sounds more frightening than "small arms." Subliminally it recalls the dire phrase "weapons of mass destruction" so famously drummed into the public psyche. So the Executive repeats the ominous phrase "weapons training" six times in its brief. That is not an accident.

The "Taliban" reprise is no accident either. The Executive never dares assert that the Petitioners had any affiliation with or even sympathy for the Taliban, or that the Taliban trained them, employed them, or associated with them. It knows that to be false. So it says the men were trained at a *facility* "supplied by the Taliban." Gov't Brief at 3, 6, 8, 41 & 54. The Taliban controlled virtually all property and all commercial activity in most regions of pre-war Afghanistan. *See* OFFICE OF THE UN COORDINATOR FOR AFGHANISTAN, VULNERABILITY AND HUMANITARIAN IMPLICATIONS OF UN SECURITY COUNCIL SANCTIONS IN AFGHANISTAN 4 (Dec. 2000), *available at* http://www.humanitarianinfo.org/sanctions/handbook/docs_handbook/OCHA%20-%20Sanctions%20in%20Afghanistan.pdf ("By September 2000, the Taliban controlled

---

4 General Hood's representatives turned somersaults to avoid providing any factual return to the *habeas* petitions. In March, his representatives moved for a stay, *see* App. 03, then wrong-footed the trial court by suggesting that Petitioners had been determined to be enemy combatants (after they had been determined not to be). App. 104 n.2. The Hood affidavit was submitted only after Petitioners' counsel reached the base, learned of Petitioners' status, and moved for emergency relief. *See* App. 208, 233-37.

90% of Afghanistan."); *see also* DOD DATA at 16.[5] Does the general mean simply that the Taliban sold or rented the real property to whoever operated it? We do not know, and cannot know, because there was no return, no factual hearing below, and no opportunity to traverse a return. What we do know -- because the CSRT so concluded -- is that these Petitioners were not "part of or supporting Taliban or al Qaeda forces, or associated forces."[6]

When the reader focuses on what the record actually *says*, the Guantánamo Myth unravels. General Hood (who was not in Afghanistan himself, and never tells us where he learned what he has repeated in his affidavit) said that Petitioners received "training in, among other things, the use of small arms." App. 234. That is, the general says, they were taught how to disassemble and assemble firearms, how to clean them, how to load, handle, aim and fire them. *If General Hood's allegation is true, then these Petitioners received the same "weapons training," literally and precisely, that thousands of Americans lawfully receive every day.*

According to the National Rifle Association, weapons training is offered at seventy-two different places in the Commonwealth of Virginia alone. *See* National Rifle Association, Education and Training Programs, Basic Firearm Training Program, *available at* http://www.nrahq.org/education/training/find.asp?State=VA&Type= (last visited Mar. 21, 2006). Training on rifles, shotguns, carbines, and pistols is common. App. 260-65. "Urban carbine" is a popular offering. *See, e.g.*, Cumberland Tactics, *available at* http://www.guntactics.com/page6.php (last visited Mar. 21, 2006). Thirty

---

[5] "Fleeing" capture is another refrain, *see* Gov't Brief at 13 & 43, but the Executive knows it bought the Petitioners in Pakistan, far from any battlefield. App. 211.

[6] The Petitioners should not be confused with, for example, Sayed Rahmutullah Hashemi, the former Taliban spokesman who today is a freshman at Yale. *See* Chip Brown, *The Freshman*, N.Y. TIMES MAG., Feb. 26, 2006, at 55.

minutes from the courthouse, three hundred and eighty dollars buys a weekend of scrambling through thickets learning to fire an AK-47. App. 247-48. At the Las Vegas Gun Range and Firearms Center, Uzis, AK-47s, and Mac-10s are available for rent. *See* Colin Harrison, *High: Vegas on $1,000 a Day,* N.Y. TIMES, Mar. 19, 2006. "Camps" like this flourish in every corner of America. App. 252 (describing the Front Sight Resort, the self-proclaimed world's premier resort for firearms training).

Through its skillful use of resonance, the Executive engages the entire law-of-war apparatus without ever mentioning the crucial law-of-war *factor* -- hostile military activity. No one suggests that the Petitioners trained or intended to act adversely to Americans or American interests. In fact, the Petitioners bear no animosity toward America, *see* App. 211, and (remarkably) share the admiration for America so common to Uighurs regularly admitted here as political refugees from Communist China. *Id.*[7] If Petitioners are "dangerous," then so are the millions of Americans who receive the same weapons training that the Petitioners are accused of receiving. They stand accused[8] of doing no more than what Americans lawfully and pervasively do. Indeed, they stand accused of carrying out the written public policy of the United States. According to the Department of State, "[t]he United States believes that the responsible use of firearms is a legitimate aspect of national life. . . . We . . . do not begin with the presumption that all small arms and light weapons are the same or that they are all problematic." John R. Bolton, Under Sec'y for Arms Control and Int'l Sec. Affairs, Dep't of State, U.S.

---

[7] *See generally* Brief of Uyghur American Association as Amicus Curiae Supporting Petitioners-Appellants.

[8] Of course there is no formal "accusation." But the Executive's brief is in practical fact precisely that -- a subtle and persistent accusation that the Petitioners are dangerous, untrustworthy, and violent; an accusation made in order to frighten the reader and support the Executive's continued and indefinite imprisonment of the men.

Statement at Plenary Session to the UN Conf. on the Illicit Trade in Small Arms and Light Weapons in All its Aspects (July 9, 2001), *available at* http://www.state.gov/t/us/rm/janjuly/4038.htm (last visited Mar. 21, 2006).

The Executive's brief also calls the Afghan village where the men stayed a "military training camp." *See* Gov't Brief at 3, 6, 8, 41 & 54. But even if that description were accurate -- even if the men had practiced marching, rather than building latrines -- the world is full of military training camps. Was this one hostile to America?[9] No one argues that a person who received small arms training at a military training camp operated by the Northern Alliance in Afghanistan may therefore be held forever at Guantánamo. For all this record shows, the "military training camp" that General Hood speaks of (and that the Petitioners were never permitted to address), *see* App. 234, was as supportive of U.S. interests as were the "camps" of the Northern Alliance. There is no evidence -- and, indeed, no overt assertion, although the implication is powerful and intentional -- that Petitioners were "trained" with malign or criminal intent toward U.S. interests, or that it had any connection to any conflict in which the President was authorized to engage by the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("AUMF"), or Article II of the Constitution.

Most important for present purposes, there is no suggestion that men who have learned how to operate a firearm represent a danger to American society. At minimum, a district court should, as we requested below, conduct a hearing to determine whether the release into U.S. society of these peaceful and long-suffering men represents the slightest

---

[9] The record contains no evidence that any Taliban personnel were at this "camp." Petitioners never had a chance below to respond to the false implication -- made here for the first time -- that they were.

threat to any human being. All the Executive offers is resonance. However powerful it may be in the court of public opinion, it should be impotent in this Court.

2. The Executive's "assistance"

A second myth that runs through the Executive's brief is even more remarkable: in effect, that the Executive has indulged the Petitioners' request not to return to their "native" country, and is hosting them at a sort of Caribbean retreat while it diligently seeks on their behalf a better situation. *See* Gov't Brief at 44-45 ("Thus, they are being detained by the U.S. military, pending the outcome of the extensive diplomatic efforts to transfer them to an appropriate country."). The Executive suggests it is host, not a jailer, doing these men a favor by not returning them to China. But they were not living in China, bought in China, or held in China. The North Korean and Chinese prisoners of war, *see* Gov't Brief at 45, were soldiers -- Petitioners were *not* -- and before marching out with their armies those soldiers had lived in China and North Korea. Petitioners had lived *outside* China. App. 211.

Despite the Executive's stubborn refusal to make a return, the record shows what has happened here. Benevolence is no part of it. A week after the 9/11 murders, China began a cynical campaign to exploit those atrocities by labeling as "terrorists" its dissident Uighur population. App. 120, 149, 169. (A spokesman later noted that a Uighur poem that "attacked government policy" was regarded as "terrorism in the spiritual form." App. 173. Though the Executive now forbids any journalist from talking to Petitioners, it permitted Communist Chinese interrogators to talk to them. S*ee* App. 134, 211.) The military advised Mr. Hakim four years ago -- before they brought him to Guantánamo -- that he had been taken by mistake. App. 212. In June, 2002, both men were transported to Guantánamo anyway. *Id. Two and a half years before the scheduled*

oral argument in this appeal U.S. officials said that the United States "had no further security interest in holding the Uighurs." App. 153.[10]

In late 2003, Pentagon sources indicated the U.S. was discussing with China the terms on which the Petitioners and others would be sent to China. App. 153. Amnesty International launched a successful campaign to stop this, noting that China had broken promises not to brutalize persons extradited from the U.S. and Thailand. *Id.* On August 12, 2004, the Secretary of State said the Uighurs were "a difficult problem" but that they "are not going back to China." App. 156. In early November, 2004, military officials told the *New York Times* that "at least half of the Uighurs here [i.e., half of 22 prisoners] are eligible for release." App. 129. Several European countries, including Norway and Switzerland, had declined resettlement requests. *Id.*

In 2005, State Department sources advised the *Financial Times* that "half of the two dozen Uighur Chinese captured in the war on terrorism have no intelligence value and should be released." App. 131. An official said that "efforts to persuade the Europeans [to accept them] -- most recently Sweden -- had collapsed." *Id.* The official said, "We don't want to send them to China, and Europe has failed." *Id.* He said the U.S. would approach Panama and other Latin American countries. *Id.* In July, 2005, the Executive wrote, "respondents agree it is appropriate to release petitioners and intend to release them as soon as possible." App. 218.

In sum, the record is clear that this has been going on for a *very* long time -- years longer than the "conclusion" of the CSRTs on March 26, 2005 -- and that the Executive has known for years that these men should not be at Guantánamo.[11] Resettlement abroad

---

10 In May, 2004, State Department spokesman Richard Boucher reiterated this. App. 135.

11 The Uighur cases show how manipulative the entire CSRT process has been. The tribunals were conducted in late 2004 and early 2005. App. 212. The

has become all but hopeless. Through its massive public relations campaign, the Executive long ago persuaded the rest of the world that Guantánamo prisoners are terrorists. The stain of this libel is indelible. Of the many wrongs done to the Petitioners, it may be the cruelest.[12]

B. The Executive's Legal Arguments

The Executive reprises three arguments it raised below and one it never did. It argues first that the Act was retroactive, *see* Gov't Brief at 16-40; second that it may lawfully imprison Petitioners at its pleasure, *id.* at 41-54; and third that the district court was correct to deny release under principles of immigration law, *id.* at 54-60. It then adds a new argument: that the petition must be dismissed as to the President. *Id.* at 60-61.

1. The Act is not retroactive.

The Act is the centerpiece of the Executive's Brief. The question whether it affects the jurisdiction of the federal courts in *habeas* cases pending prior to the effective date of the Act has been thoroughly briefed in other Guantánamo appeals, and this brief says nothing new on the point. To avoid burdening the Court with duplicative briefing, Petitioners refer the Court to (and incorporate in this appeal) the Second Supplemental Brief of Appellants Regarding Section 1005 of the Detainee Treatment Act of 2005,

---

Executive regulations authorizing the CSRTs in July 2004 provided that the panels were to "review" determinations of "Enemy combatant status" previously made through "multiple levels of review." Add. 21. Yet the record as set out above shows that the Executive *already knew* that Petitioners were not enemy combatants before any such CSRT proceeding was convened, or even conceived.

[12] Justice Jackson wrote of Ignatz Mezei, the alien stranded at Ellis Island, "Since we proclaimed him a Samson who might pull down the pillars of our temple [Mezei was a suspected communist], we should not be surprised if peoples less prosperous, less strongly established and less stable feared to take him off our timorous hands." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 220 (1953) (Jackson, J., dissenting).

Boumediene v. Bush, No. 05-5062 (D.C. Cir. Mar. 10, 2006), and the Guantánamo Detainees' Second Supplemental Brief Addressing the Effect of the Detainee Treatment Act of 2005 on this Court's Jurisdiction Over the Pending Appeals, *Al Odah v. Bush*, Nos. 05-5064, 05-5095-116 (D.C. Cir. Mar. 10, 2006). These briefs set out in detail why the Act is not retroactive.

Petitioners reply to the argument, *see* Gov't Brief at 40, that the Act, construed retroactively, would not constitute a bill of attainder. As with the other constitutional points raised as to retroactivity, we have not argued that the Court should decide the question here. All that we say is that the Executive's construction of the Act would raise the kind of serious constitutional questions that courts strive to avoid. Opening Brief at 17. One of those serious questions is whether the Act, so construed, would be a bill of attainder.

The Executive argues that it would not. Imprisonment behind razor wire at Guantánamo Bay, it says, "can hardly be deemed punitive in nature." Gov't Brief at 40. The Executive's idea of what is punitive is, shall we say, unconventional. *See United States v. Brown*, 381 U.S. 437, 458 (1965) (imprisonment regardless of its purpose is punishment). The Bill of Attainder Clause has been held to invalidate a broad range of punishments. *See, e.g., Cummings v. Missouri*, 71 U.S. 277, 320 (1866) (invalidating a loyalty oath that effectively denied former Confederates the right to engage in their profession, noting that "the deprivation of any rights, civil or political, previously enjoyed, may be punishment" including "the privilege of appearing in the courts"); *see also Nixon v. Administrator of Gen. Serv.*, 433 U.S. 425, 475-76 (1977) (punishment not limited to historical examples but reaches to new forms of punishment of which Congress may conceive). Revoking a non-enemy combatant's *habeas* rights after four years in custody falls squarely within the purview of the Clause.

At its core, the Bill of Attainder Clause protects against usurpation by the legislature of the judicial function. *Brown*, 381 U.S. at 445 ("[T]he Bill of Attainder Clause. . . reflect[s] the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness, of, and levying appropriate punishment upon, specific persons."). "By banning bills of attainder, the Framers of the Constitution sought to guard against such dangers by limiting legislatures to the task of rule-making." *Id.* at 446. Statements made by the legislators discussing earlier drafts of the Act show that if the courts applied the Act retroactively, they would be indulging a desire to levy just such specific punishments on a class of pre-judged persons. *See, e.g.*, 151 Cong. Rec. S12652 (daily ed. Nov. 10, 2005) (statement of Sen. Kyl) ("So let's be very clear about this Great Writ. It does not apply to terrorists, and it should not apply to terrorists, and nothing in this amendment goes any further than to say it applies to U.S. citizens. It does not apply to terrorists."); 151 Cong. Rec. S12659 (daily ed. Nov. 10, 2005) (statement of Sen. Specter) ("There is no doubt that these detainees are the worst of the worst. That is the way they have been characterized. We are facing very difficult problems with these terrorists."); 151 Cong. Rec. S14256-01 (daily ed. Dec. 21, 2005) (statement of Sen. Graham) ("The Bush administration [sought to] prevent exactly what we have seen happen since Rasul: terrorists with lawyers. Now I'm a lawyer myself, and I think we can all agree that that is a bad combination.").

We emphasize that, for reasons stated elsewhere, the Act as finally passed was not intended to reach existing Guantánamo cases. But if the Court disagrees, it will be left with a stark record "that the legislative process and the law it produces indicate a congressional purpose to behave like a court and to censure and condemn." *Foretich v. United States*, 351 F.3d 1198, 1226 (D.C. Cir. 2003). This is all the more troublesome,

given that the military data show that 55% of the detainees held at Guantánamo have never been alleged to have committed a hostile act against the United States or its allies. DOD DATA at 2.

2. Petitioners' detention is unlawful.

The Executive next argues that the imprisonment is lawful. Gov't Brief at 41-54. It begins by saying that the AUMF authorized the Petitioners' capture. Congress never authorized the President to purchase from Pakistan and export to Guantánamo those who oppose Chinese communism. If that kind of authority can be teased out of an authorization to use force against persons responsible for the 9/11 atrocities, then the President was given power to make war against the whole world, forever.[13] But the argument is academic. We are not arguing about whether seizing Petitioners was appropriate in the first place. The question now is why they remain in captivity four years later.

The Executive tries to address this point next, in its argument that it has a "wind up" power. Gov't Brief at 44-48. It cites no legal authority. It makes no historical case either, citing inapposite history involving North Korean and Chinese soldiers taken on the battlefields of Korea, and the Geneva-compliant, six-months-and-done post-war operations of the First Gulf War. It never addresses the actual post-war conditions of World War II prisoners of war. *See* Opening Brief at 27-31. It never explains what, if anything, limits this wind-up power. Indeed, it is clear that nothing would limit it. The Executive is carving out important territory here: if it is correct, then we are long past

---

[13] The AUMF permits only the use of "force," applies only to those involved in the September 11 attacks, and extends only to the "prevent[ion of] . . . future acts of international terrorism against the United States by such nations, organizations or persons." AUMF at 224.

little old ladies in Geneva who unwittingly give to the wrong charity.[14] The proposition is that the Executive may seize anyone, anywhere on the Globe, hood him, shackle him, and take him to an island forever, as long as it assures us that it is pursuing an "orderly" windup. About the best the Executive can do here is engage in mythmaking, to the effect that it is indulging the Petitioners by not sending them back to their "native" China. It never captured them in China. They never marched out from China as soldiers; indeed, they were never soldiers at all.

In the brave new world for which the Executive longs, it may, without noisome judicial inquiry, freely seize and imprison whom it likes, where it likes, during the pendency of a war on a common noun.[15] The closest pass the Executive makes to this fanciful planet comes at pages 51-52 of its brief, in its discussion of *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). The decision, roundly criticized at the time and ever since,[16] stranded Ignatz Mezei at Ellis Island, potentially indefinitely. It arose during a period not unlike our own, when a single word (then it was "communist") prompted such fear and revulsion that few trifled to inquire whether, in a given case, the word fairly described the person branded with it. Justice Jackson -- who knew something of indefinite detention, having opened for the prosecution at Nuremberg by discussing

---

[14] *See In re Guantanamo Detainee Cases*, 355 F.Supp. 2d at 475 (government argued that it had the power to detain "little old lady in Switzerland" who unwittingly gave to charity front).

[15] Terrorism has, of course, been a part of human conflict forever. It has flourished in the Middle East ever since the Balfour Declaration of 1917, and today shows renewed vigor.

[16] *See generally* Charles D. Wessleberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933 (1995).

what indefinite detention did to Germany[17] -- filed a dissent eerily predictive of our current national folly. "Fortunately it still is startling, in this country, to find a person held indefinitely in executive custody without accusation of crime or judicial trial," it began. *Id.* at 218. It continued:

> Quite unconsciously, I am sure, the Government's theory of custody for 'safekeeping' without disclosure of charges, evidence, informers or reasons, even in an administrative proceeding, has unmistakeable overtones of the 'protective custody' of the Nazis more than of any detaining procedure known to the common law.

Id. at 226.

An advocate who invokes the Nazis in this Court will be dismissed as shrill. But this is not an advocate's metaphor. It comes from a great justice of the Supreme Court, and a justice with the unique life experience to discern such risks. Three others joined him. Justice Black's dissent, when read in the courtroom, "was an oration. It went from a whisper to a thunder. The court-room was transfixed."[18]

So *Mezei's* 5-4 majority is an historical curiosity, and the thoughtful reader is much troubled by the dissents. Yet try as it might, the Executive cannot steer even *Mezei's* majority opinion into the orbit of its desired Planet-Beyond-Courts. First, unlike these Petitioners, Mezei was a volunteer. He left the country voluntarily and returned, voluntarily, without a visa. The Executive did not buy him. It did not interrogate him for six months in Kandahar before deciding to shackle him, hood him, and bring him in chains to "territory over which the United States exercise exclusive jurisdiction and control," *Rasul*, 542 U.S. at 475, a "place that belongs to the United States," *id.* at 487

---

[17] *See* 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL TRIBUNAL 110-11 (1947). The indictment alleged that the defendants used "protective custody" to make the regime "secure from attack and to instill fear in the hearts of the . . . people." *Id.* at 34-35.

[18] ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 410-11 (1994).

(Kennedy, J., concurring in the judgment). Mezei also sought, at least initially, an immigration-type remedy: admission. His *habeas* claim came later. Last, the government apparently believed of Mezei that he was a "communist." Here the military believes that the Petitioners are not enemy combatants.

The Executive's brief then turns to the serious problems the *Zadvydas* and *Martinez* decisions pose for the Executive's position, dismissing those cases as construing an irrelevant immigration statute.[19] Gov't Brief at 49. But it does not matter *which* Act of Congress was at issue. The rule of each case is that *no* Act of Congress can be read to permit indefinite imprisonment -- even an act that deals with alien criminals, appears on its face to authorize their indefinite imprisonment, and addresses deportation. In an opinion written by a justice who dissented in *Zadvydas*, *Martinez* held that its rule applies even to those criminal aliens who never made an entry. Real interests were at stake in those decisions; not the trifling standing issue here. The aliens were criminals. In one of the cases they had made no entry. Even so, they had to be released into U.S. society. In this appeal the concern is not that a violent -- or even a petty -- criminal might be turned loose on American soil, but that innocent men might somehow gain enough of an "entry" to fill out a form requesting a discretionary asylum that the Executive might seek to deny.

3. The district court was obliged to fashion a remedy for unlawful detention.

The Executive argues third that in any event Judge Robertson was right to deny a remedy, because immigration law barred him from granting one. Gov't Brief at 54-60. Silence shouts from these pages -- there simply is no response to the authorities cited in

---

[19] *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Clark v. Martinez*, 543 U.S. 371 (2005).

our Opening Brief, and the briefs of *amici*, that require a court having jurisdiction to decide a case and give a remedy. *See generally* Opening Brief at 32-38; Brief of Hon. John J. Gibbons, Hon. Shirley M. Hufstedler, Hon. Timothy K. Lewis, Hon. William A. Norris, Hon. H. Lee Sarokin and Hon. William S. Sessions as Amici Curiae Supporting Petitioners-Appellants at 5-19. Instead, the Executive characterizes Petitioners as immigrants who have "[demanded] a court order permitting them to enter the United States," and cites a string of immigration cases that stand for the unremarkable proposition that those who seek visas or immigration remedies cannot do so in the courts. Gov't Brief at 55. The short answer is that Petitioners are not here seeking immigration status. They seek an end to illegal imprisonment. Because the Executive cannot release them abroad, and will not release them to the civilian side of the Guantánamo Naval Base, Petitioners seek release in the only place left: the federal court sitting in this district. They request only that the district court do what Congress said it should do: command that the body be produced, conduct a hearing, and if it finds (as it has rightly found) no lawful basis for imprisonment, discharge the prisoner. *See* 28 U.S.C. § 2243. At that moment the prisoner would about-face and walk, with the public, out the front door of the courthouse. What his immigration status would be then is for others to say. Perhaps the Executive will be deemed to have effected his entry by bringing him to a place that is, in all practical respects, part of the United States and that is subject to the jurisdiction of its courts. Perhaps it will be estopped to deny that it has. Perhaps the Executive will say the Petitioners are subject to deportation. Perhaps it will argue that the result of release is parole, or unlawful entry, or no entry at all. Perhaps there will be a debate about whether Petitioners now have standing to fill out a form.

But none of that is here. If there is a conflict here, it is incidental.[20] On the one hand, the Constitution has enshrined a central right to be free of lawless Executive imprisonment, and Congress has passed a law to enforce this right. On the other hand, Congress has passed another law defining the places in the world where dry feet give a person the right to ask the Executive to exercise discretion. If these two congressional enactments truly are in conflict, then the Court might have to weigh which policy is the more important. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 528-29 (2004) (where interests of government and individual rights conflict, court employs balancing test to find resolution). Hamdi's citizenship and the Executive's claim that he had been captured on the battlefield by the Northern Alliance indicates that very different weights went into the pans, but the juridical use of the scale to weigh policies in conflict is the same. Specifically, the congressional policies that the Executive posits as in conflict are (i) the policy of 28 U.S.C. § 2241, which requires the prompt release from captivity of those held by the Executive without sufficient legal basis, and (ii) the policy of 8 U.S.C. § 1101, that we should not confer standing to request discretionary immigration relief on just anybody. To ask the question which policy is more important is to answer it.

4. The President is a proper *habeas* respondent.

The Executive argues here for the first time that the denial of *habeas* relief to the Petitioners should be affirmed "on the alternative ground that federal courts have no jurisdiction . . . to enjoin the President in the performance of his official duties' or otherwise to compel the President to perform any official act." Gov't Brief at 60-61 (internal quotation marks and citations omitted). A federal appellate court cannot entertain issues raised for the first time on appeal. *See Singleton v. Wulff*, 428 U.S. 106,

---

[20] *See generally* Brief of American Civil Liberties Union as Amicus Curiae Supporting Petitioners-Appellants at 4-11.

120 (1976) ("It is the general rule . . . that a federal appellate court does not consider an issue not passed on below."); *Peralta v. United States Attorney's Office*, 136 F.3d 169, 174 (1998) (refusing to consider argument raised by the Executive for first time on appeal). Because the Executive failed to present this argument below, it is waived.

The Executive would avoid this bar by arguing that the issue is jurisdictional. The argument fails. As the Supreme Court has unanimously held, a federal court's jurisdiction is controlled by jurisdictional statutes, not by statutes defining causes of action. *Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235, 1244 (2006). Absent any indication from Congress that a *habeas* claim is jurisdictional, the Executive's argument that the President is not a proper *habeas* respondent is properly classified as nonjurisdictional in nature. *Id.* at 1245 ("[W]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character."). If a statute limiting the reach of the Civil Rights Act to only certain defendants is not jurisdictional, then a doctrine born in case law clearly is not jurisdictional.

Moreover, the cases upon which the Executive relies do not hold that a President who imprisons persons under claimed war powers is not a proper respondent to a *habeas* petition. Indeed, the Executive's cited cases are not *habeas* cases at all, but rather cases in which the petitioners sought to enjoin the President from the performance of his official duties. *See Franklin v. Massachusetts*, 505 US. 788, 802-803 (1992) (holding that the district court could not issue an injunction ordering the President to recalculate congressional seats based on a new apportionment method); *Mississippi v. Johnson*, 71 U.S. 475, 492 (1866) (rejecting the State of Mississippi's bid to enjoin the President from carrying into effect an Act of Congress). In this case, Petitioners seek no injunction. They seek release from Executive imprisonment.

Rasul v. Bush (in which the President was a respondent) shows that federal courts have jurisdiction over *habeas* petitions brought by Guantánamo detainees against the President. The President carried out the "military force" under color of which they were detained. 542 U.S. at 485 ("What is presently at stake is . . . whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing. Answering that question in the affirmative, we reverse the judgment of the Court of Appeals and remand for the District Court to consider in the first instance the merits of petitioners' claims."); *see also id.* at 484 n.15 (holding that petitioners' allegations "unquestionably describe[d]" a claim under the Constitution or laws of the United States). It has long been the law that in an Executive-detention *habeas* case, the President is a proper respondent. *See, e.g., Ex parte Merryman*, 17 F. Cas. 144, 9 Am. Law Reg. 524 (C.C. Md. 1861) (Chief Justice ordered President to end an unlawful wartime imprisonment). Thus the President is a proper party to this petition.

The President is an appropriate respondent to this proceeding for practical reasons as well. As leader of the Executive Branch, his presence is appropriate to ensure that, after this case is decided, we do not have a new mischief of litigation in which the President himself -- or non-military departments subject to the President's control but not to that of the other respondents -- later argues that they somehow are not bound by the rulings of the Judicial Branch in this case.

CONCLUSION

There is a remedy here. Nothing in law or fact stands in its way. "It is inconceivable to me," wrote Justice Jackson, "that this measure of simple justice and fair dealing would menace the security of this country. No one can make me believe that we are that far gone." *Mezei*, 345 U.S. at 228 (Jackson, J., dissenting).

For the reasons set forth in their Opening Brief and herein, Petitioners respectfully request that the Court (1) affirm the district court's ruling that the Executive's continued detention of Petitioners is illegal; (2) reverse the district court's ruling denying a remedy to Petitioners; (3) remand the case to the district court with instructions that Petitioners should be released under appropriate conditions; and (4) grant such other and further relief as the Court deems just and proper.

Dated: March 22, 2006

Respectfully submitted,

Sabin Willett (Bar No. 50134)
Counsel of Record
Rheba Rutkowski
Neil McGaraghan
Jason S. Pinney
BINGHAM MCCUTCHEN LLP
150 Federal Street
Boston, MA 02110
(617) 951-8000

Susan Baker Manning (Bar No. 50125)
BINGHAM MCCUTCHEN LLP
1120 20th Street NW, Suite 800
Washington, D.C. 20036
(202) 778-6150

Barbara Olshansky
Deputy Director
CENTER FOR
CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6439

Counsel for Petitioners-Appellants

Certificate of Compliance Under Fed. R. App. 32(a)(7)

I, Sabin Willett, hereby certify that, based upon the word and line count of the word processing system used to prepare this brief, the brief contains 6,675 words.

Sabin Willett (Bar No. 50134)

No. 05-5477

In the
United States Court of Appeals
for the
District of Columbia Circuit

ABU BAKKER QASSIM and ADEL ABDU' AL-HAKIM,

Petitioners-Appellants,

v.

GEORGE W. BUSH, ET AL.,

Respondents-Appellees.

CERTIFICATE OF SERVICE

I, Sabin Willett, have this 22nd day of March, 2006, served copies of this Reply Brief of Petitioners-Appellants via Federal Express or electronic mail to:

Robert Mark Loeb
U.S. Department of Justice
Civil Division
950 Pennsylvania Avenue, NW
Room 7268
Washington, DC 20530-0001

Arthur Barry Spitzer
AMERICAN CIVIL LIBERTIES UNION
OF NATIONAL CAPITAL AREA
1400 20TH Street, NW
Suite 119
Washington, DC 20036
202-457-0800

Steven R. Shapiro
Judy Rabinovitz
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street
18th Floor
New York, NY 10004-2400

Lucas Guttentag
AMERICAN CIVIL LIBERTIES UNION
405 14TH Street
Suite 300
Oakland, CA 94612
510-625-2010

Sundeep Hora
ALDERMAN & DEVORSETZ, PLLC
1025 Connecticut Avenue, NW
Suite 1000
Washington, DC 20036

Lorelie S. Masters
JENNER & BLOCK
601 13TH Street, NW
Suite 1200 South
Washington, DC 20005
202-639-6000

Jonathan Lewis Hafetz
New York University School of Law
161 Avenue of the Americas
12th Floor
Brennan Center for Justice
New York, NY 10013
212-998-6730

Sabin Willett (Bar No. 50134)